

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1271

To be argued by
SHEILA GINSBERG

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

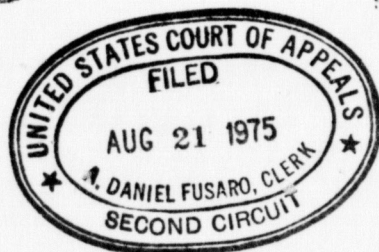
ANDRES ROMAN,

Appellant.

Docket No. 75-1271

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ANDRES ROMAN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(07)					
Fine,					
Clerk,					
Marshal,					
Attorney,					
XXXXXXXXXX T.21					
XXXXXXXXXX 812,841(a)(1),					
(b)(1)(A) Posses. & distr.					
w/intent to distr. Schedule I&II					
Heroin, Cocaine & Methadone.					
(One Count)					

DATE	PROCEEDINGS
0-19-73	Filed indictment.
0-29-73	William Gallagher, Esq., assigned as attorney under C.JA. by Magistrate Larry S. Greenberg of counsel. Pleads not guilty. (\$1,000 P.R.B. by 10%) Motions returnable in 10 days. Assigned to Judge Duffy for all purposes. Weinfeld, J.
Nov. 12-73	Filed Govt's notice of readiness for trial.
11-7-74	Filed afdvt. & notice of motion dismissing the indictment... Ret. 11-11-74
11-11-74	Filed Court's exhibit 1 ordered impounded and sealed and placed in vault in room 602... Duffy, J.

— OVER —

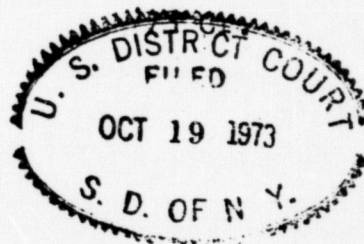
DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
11-11-74	Filed Waiver of trial by Jury. Non Jury trial begun..Adjd. without date. Duffy,J.....		
11-11-74	Filed affdvt.of T.Gorman Reilly,AUSA in opposition to motion to dismiss		
11-11-74	Filed memo endorsed on motion filed 11-7-74...Motion denied..Duffy,J.		
6-2-75	Filed opinion #42505 Deft waived a jury and I began the trial on Nov.11,1974*** A verdict of guilty is hereby directed. The deft will be remanded the date for surrender to be set by the Dept.of Justice not later than five days from the date of this opinion. P.S.I. is requested..Sentence will take place on June 30,75. Duffy, J...m/n		
6-6-75	Deft. present with his atty. Deft was to surrender today. Bail application made by the deft...Bail to be continued \$1,000 P.R.B. by 10%..Sent.date June 30-75.		
6-30-75	Filed JUDGMENT & ORDER OF PROBATION (atty present) Imposition of Sentence is Suspended Deft. is placed on probation for a period of TWO (2) YEARS. Probation imposed is subject to the standing probation order of this Court. Limits of probation will be extended to such places where his common-law may be incarcerated.....Duffy,J. Issued copies 7-3-75.		
7-2-75	Filed deft's. notice of appeal from the Judgment of conviction entered on 6-30-75. Mailed copies to Andres Roman, 1980 2nd Ave.,N.Y.C. and U.S. Attorney's Office.		

73 CRIM. 977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA :
 :
-v- :
 :
ANDRES ROMAN, :
 :
Defendant. :
----- x

INDICTMENT



The Grand Jury charges:

On or about the 14th day of June, 1973, in the Southern District of New York, ANDRES ROMAN, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute Schedules I and II narcotic drug controlled substances in the following approximate weights:

- 3.07 grams of heroin hydrochloride,
- 4.04 grams of cocaine hydrochloride,
- and 8.55 grams of methadone.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

James P. Curran
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

ANDRES ROMAN,

Defendant.

INDICTMENT

73 Cr.

Title 21, U.S.C., §§ 812,
841(a)(1) and 841(b)(1)(A).

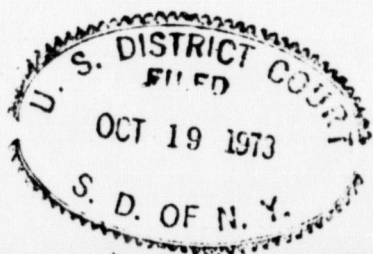
PAUL J. CURRAN

United States Attorney.

A TRUE BILL

Foreman.

FPI-SS-2-19-71-20M-6950



William Gallagher

ROBERT KAGANOF, ESQ., ASSIGNED AS ATTORNEY UNDER C.J.A. by Magistrate.

Harry S. Greenberg OF COUNSEL

Minds not guilty - Bail continued. (\$1,000 P.R.B. By 10%) motions
set in 10 days. Assigned to Judge Duffy
for all purposes. Weinfield, J. A

NOV 11 1974

d

(T. Norman Bailey)
Non jury trial begun and adjourned
without a date.
Defendant waives trial by jury.

MAY 30 1975 OPINION FILED.

JUN 6 - 1975 DEFENDANT PRESENT WITH HIS
ATTORNEY. DEFENDANT WAS TO SURRENDER TODAY.
BAIL APPLICATION MADE BY THE DEFENDANT.
BAIL TO BE CONTINUED (\$1,000 P.R.B. By 10%).
SENTENCE DATE JUNE 30, 1975.

6-30-75 Left present (atty Jack Lipson
& legal his present) Imposition of Sentence
Suspended. Left place on Probation
not to exceed 2 years. Limits of Probation
will be extended when his wife is
incarcerated. Subject to the extension
Probation order of the Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :
 :
 -against- : OPINION
 :
 ANDRES ROMAN, : 73 Cr. 977
 :
 Defendant. :
-----X

APPEARANCES:

HONORABLE PAUL J. CURRAN
United States Attorney
Attorney for United States of America
By: T. Gorman Reilly
Assistant United States Attorney
Of Counsel

LARRY S. GREENBERG, ESQ.
Attorney for Defendant

KEVIN THOMAS DUFFY, D.J.

The defendant, Andres Roman, was indicted, 73 Cr. 977, and charged in one count with possession with intent to distribute narcotic drug controlled substances, 21 U.S.C. §§ 812, 841, (a) (1) & 841(b) (1). Roman waived a jury and I began the trial on November 11, 1974. Although there has been no request under Rule 23(c) F.R.Cr.P. that I find the facts specifically, I believe it is only fair

to set forth the evidence upon which I base my decision.

On the morning the trial commenced, the defendant moved to dismiss the indictment on the grounds that, in violation of Brady v. Maryland, 373 U.S. 83 (1963), the government had failed to turn over to the defense material that might possibly be exculpatory. The material the defendant sought was post-arrest, pre-arraignment statements that may have been made by the defendants in a closely related case, 73 Cr. 981, specifically Domingo Rosario, Ignacia Rosario and Carolyn Baxter.

In response to this Brady motion the government asserted that it did not have any exculpatory statements in its possession. However, the government did admit that the particular statements the defendant sought are those which would ordinarily appear on Form No. USA 33-S-306, which is a U.S. Attorney's pre-arraignment form, and that for the three defendants in 73 Cr. 981 and for the defendant in this case, these forms could not be found despite three separate attempts to locate them.

I decided that a hearing would be necessary to determine whether any statements had been made and, if they had, why they were now apparently missing. Because the witnesses necessary for such a hearing were not immediately available, I proceeded with the trial and reserved any decision

until after a Brady hearing could be scheduled. That hearing was set for December 2, 1974, and since the apparent disappearance of the allegedly exculpatory statements involved not only the defendant in this case but also the defendants in the related case referred to above, 73 Cr. 981, the hearing was a joint hearing and attorneys for the defendants in both cases were present.

The evidence introduced at this hearing established that Andres Roman, Domingo Rosario and Ignacia Rosario were arrested on June 14, 1973. The investigations leading to their arrest had been conducted by the New York Drug Enforcement Task Force and, therefore, after their arrests they were taken to the Task Force headquarters at 201 Varick Street for processing. Harold Rodell, the Task Force Group Supervisor in charge of these cases, testified that neither during the processing period nor at any later time did he, or as far as he knew, any member of his staff, take any written statements from any of these defendants.

Rodell further testified that on the date these defendants were processed, two attorneys were assigned to work with his Task Force office, Dan Pykett and Vincent Promuto, and that in the usual course each defendant would have been interviewed by one of those attorneys prior to arraignment. During this interview, the Task Force attorney

would, under standard procedures, complete Form No. USA 33-S-306 entitled "Statement of Defendant Before Arraignment Made to an Assistant United States Attorney" (hereinafter "Form 306"). Rodell did not know which Task Force Attorney, Pykett or Promuto, interviewed these defendants and he stated that a search of all the files in the office failed to uncover any pertinent Form 306s.

The second witness called at the hearing was Lawrence Mason, who at the relevant time was the Administrative Assistant to Andrew J. Maloney, the then Regional Director of the Office for Drug Abuse Law Enforcement ("ODALE"). Mr. Mason testified that starting in May of 1973 and for approximately four months thereafter, Vincent Promuto was employed by ODALE and was assigned to work with the Task Force at its 201 Varick Street office. Mr. Mason then stated that during the week preceding the hearing both he and Miss Debra Prager, who had been Promuto's secretary, searched all of their files and were unable to locate any Form 306s for Roman, the Rosarios, or Carolyn Baxter.

The third and final witness^{1/} to testify at the Brady hearing was Vincent Promuto, who is presently the head of Public Affairs for the Drug Enforcement Administration but who was, on June 14, 1973, a special prosecutor assigned

to the New York Joint Task Force. Promuto testified that he, and not Pykett, had interviewed Domingo Rosario, Ignacia Rosario and Andres Roman. He stated that it was his usual practice to fill out a Form 306 for each defendant he interviewed. However, he did not usually fill out that part of page two of Form 306 which was the space designated for "Defendant's Statement". Promuto said that as a general practice he would not take a statement from defendants because "I felt like I spent half my time in court if I did testifying." Promuto had no recollection of being given a statement by Andres Roman, Domingo Rosario, Ignacia Rosario or Carolyn Baxter, nor did he have any idea of what could have happened to the Form 306s he had filled out.

On the basis of the testimony adduced at the hearing, I find that the interviewing attorney, Vincent Promuto, did not take any statements from any of the defendants and, therefore, the missing Form 306s which he completed could not contain any exculpatory material. I further find that the loss of the Form 306s was inadvertent and accidental and that the government has made a good faith effort to locate them. The motion to dismiss the indictment for failure to turn over exculpatory material is therefore denied.

Turning then from the Brady hearing to the trial itself, the prosecution introduced the testimony of six government agents and there was a stipulation as to a chemist's testimony. The defense did not call any witnesses.

The testimony and the exhibits established that on June 14, 1973, nine officers from the Task Force executed a federal search warrant with a no-knock clause at apartments 15-16 of 1990 Second Avenue in Manhattan. The officers made a forced entry at approximately 5:45 a.m. and, coming in through the kitchen and walking through an adjoining living room, some of the agents turned into a bedroom. In this bedroom they found the defendant Andres Roman sleeping in bed with a small child.

On the night stand next to the bed in which Roman was sleeping the agents found and seized a tinfoil ball and a clear plastic bottle. The tinfoil ball contained approximately 3.6 grams of cocaine which was wrapped in six small tinfoil packets. The clear plastic bottle contained 13.2 grams of cocaine in seventeen tinfoil packets.

Elsewhere in this bedroom the agents found and seized, from a bureau drawer, 41 glassine envelopes in three different bundles; the contents of these envelopes were field tested as cocaine but later found to be heroin. Also in the bureau drawer was a gold metal key-shaped case which contained marijuana.

In the living room of the apartment the agents found and seized two tinfoil packets; two marijuana cigarettes; a jar of lactose; a small scale; a measuring spoon; a strainer; and four marquis reagents of the type generally used for field testing drugs. The kitchen refrigerator must have had a "chilling effect" on the six tinfoil packets of cocaine that were found therein. Like the refrigerator, the bathtub was also put to a somewhat unusual use -- it was used for storing 700 small glassine envelopes of the type usually used for bagging narcotics for retail sales. Five methadone tablets were found in a bedroom other than the bedroom Roman had been sleeping in.

In addition to the narcotics and paraphernalia described above, some money was also seized from the apartment. A Nestle's Quick can taken from the bureau in the bedroom in which Andres Roman had been sleeping contained not "hot" chocolate but approximately \$211. A black purse found in another bedroom contained \$213.63.

During this search and seizure Andres Roman was placed under arrest. Michael Spataro of the New York City Police Department read him his rights; these were read from a card that Officer Spataro carried in his wallet. Officer Spataro asked the defendant, "Having these rights in mind, do you wish to talk to me without a lawyer?" Roman was then

asked whose "stuff" it was that had just been seized and Roman answered that it belonged to him.

Prior to being taken out of the apartment, Andres Roman again stated that all of the "stuff" in the apartment was his. His common-law wife, Ignacia Rosario, was present when this statement was made and she stated, "Yes, that is right, all the stuff is his."

In addition to the physical evidence and the defendant's admission, the government offered the testimony of Don Sturn, an employee of the Department of Justice assigned to the New York Joint Task Force. Mr. Sturn stated that on June 7, 1973, seven days before the events which form the basis of this indictment, he was working in an undercover capacity and had a conversation with the defendant. During this conversation Roman told Sturn that he could supply him with "weight", an one-eighth kilo of heroin, because he had a "good connection." Roman and Sturn set a time and place for Sturn to pick up the one-eighth kilo but Sturn did not keep this appointment.

On the basis of the testimony introduced at trial, I find that the government has proven beyond a reasonable doubt that the defendant Andres Roman did, on June 14, 1973, unlawfully, intentionally and knowingly possess with intent

to distribute Schedule I and II narcotic drug controlled substances in violation of 21 U.S.C. §§ 812, 841(a)(1) & 841(b)(1)(A).

A verdict of guilty is hereby directed. The defendant will be remanded the date for surrender to be set by the Department of Justice not later than five (5) days from the date of this opinion. A pre-sentence report is requested. Sentence will take place on June , 1975.

U. S. D. J.

Dated: New York, New York
1975.

1/ The parties apparently understood that Mr. Fromuto was to be the last witness to testify at the Brady hearing. There was, however, a failure in communication for it was my understanding that the government wished to call one additional witness who was travelling somewhere in Asia. I postponed a decision on the motion, and consequently a decision on the trial, until this witness returned from Asia. When quite some time passed and I was not informed of the return of this witness, I contacted the parties and was informed that neither side intended to call any further witnesses. This failure of communication resulted in the unfortunate delay in the filing of this opinion.

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Magistrate's Docket No. *73.*

Case No. *84H.*

VS.

1980 2nd Ave., N.Y., N.Y.
Apts. 15 and 16 (Combined into one
Apt.) Fifth Floor Rear

SEARCH WARRANT

To Any officer or Agent New York Joint Task Force or Bureau of
Narcotics and Dangerous Drugs
Affidavit having been made before me by S/A Don Sturn

that he { has reason to believe } that { ~~XXXXXX~~ }
is ~~XXXXXX~~ { on the premises known as }

1980 2nd Avenue
New York, New York
Apartments 15 and 16 (Combined into one apartment)
Fifth Floor rear

in the Southern

District of New York

there is now being concealed certain property, namely narcotic drugs, cutting material and paraphernalia books, papers, ^{here descriptive property} monies, passports and false identity documents, weapons

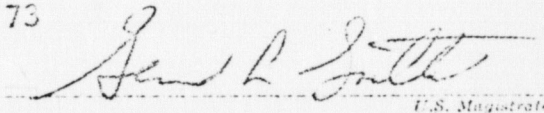
which are designed for use or which have been used or are being used as the means of committing an criminal offense.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the { ~~PERSON~~ premises } above described and that the foregoing grounds for application for issuance of the search warrant exist. That grounds exist for entry into the

premises without notice and further that this warrant may be served pursuant to Title 21, U.S.C. § 879(a) ^{extended pursuant to} ~~PERSON~~ ^{limited for the property specified}

You are hereby commanded to search forthwith the { ~~PERSON~~ place } ^{extended pursuant to} ~~PERSON~~ ^{limited for the property specified} Title 21, U.S.C. § 879(a) serving this warrant and making the search { ~~PERSON~~ at any time in the day or night } and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 7th day of June, 1973


U.S. Magistrate.

¹ The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

RETURN

I received the attached search warrant June 7, 1973, and have executed it as follows:

On June 14, 1973 at 5:45 AM o'clock M, I searched ^{the person} ~~the premises~~ described in the warrant and

I left a copy of the warrant with Ignacia Rosario
name of person searched or owner or "at the place of search"
 together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

one (1) tin foil packet containing approx. 3.6 grams of suspected cocaine
 one (1) brown plastic bottle containing approx. 13.2 grams of suspected cocaine
 two (2) tin foil packs containing approx. .5 grams of suspected cocaine
 one (1) gold metal case containing approx. .3 grams of suspected marijuana
 thirty six glassine envelopes containing approx. 15.4 grams of suspected cocaine
 numerous assorted pills (tablets and capsules)
 two (2) suspected marijuana cigarettes
 one (1) clear plastic bottle containing approx. 10.6 grams of suspected cocaine
 five (5) large tablets of suspected methadone
 one (1) plastic jar containing approx. 4 1/2 lb. of suspected lactose
 one (1) Nestle's milk can containing \$211.25
 one (1) black purse containing \$211.63
 one (1) small scale
 five (5) bank account savings books
 one (1) strainer and one (1) spoon both containing a white, powdery residue
 four (4) marquis reagent drug testers
 one (1) cardboard box containing approx. 700 glassine envelopes
 This inventory was made in the presence of IGNACIA ROSARIO

and S/A HAROLD RODELL

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

Robert Walker

Subscribed and sworn to and returned before me this 12 day of Jun, 1973

[Signature]

U. S. Magistrate.



No. 19701

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

VS.

1980 2nd Ave., N.Y., N.Y.
Apts. 15 and 16 (Combined into one
Apt.) Fifth Floor Rear

Magistrate's Docket No. 73Case No. 844

AFFIDAVIT FOR SEARCH WARRANT

BEFORE

Name of Magistrate

Address of Magistrate

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that ~~COXMAN PERSONAL~~
~~CRIMINAL~~ (on the premises known as)

1980 2nd Avenue
New York, New York
Apartments 15 and 16 (Combined into one apartment)
Fifth Floor Rear

in the Southern

District of New York

there is now being concealed certain property, namely ~~here describe property~~ narcotic drugs, cutting
material and paraphernalia books, papers, monies, passports
and false identity documents, weapons

which are designed for use or which have been used or are being
used as the means of ^{here give alleged grounds for search and seizure} committing a criminal offense.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE RIDER

Don Sturn

Signature of Affiant.

Special Agent BNDD

Official Title, if any.

Sworn to before me, and subscribed in my presence,

June 7, 1973

Gen L. Smith

United States Magistrate.

¹ The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

FPI LC-7-71-40M-5054

I am a Special Agent of the Bureau of Narcotics and Dangerous Drugs assigned to the New York Joint Task Force and as such, acting in an undercover capacity I visited the premises at 1980 2nd Ave., New York City, Apts 15 and 16, which are combined into one apartment, on the fifth floor rear of said building and observed the following:

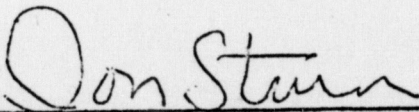
1. On May 2, 1973 I spoke, at length in the said apartment with the lessee Ignacia Rosario and her son Domingo, a/k/a Tony, about narcotic drugs. I was advised that the Rosario's could supply up to 1/8 kilo of heroin. I was shown lactose and other cutting agents and given advise on the proper uses of each kind.

2. On May 11, 1973, I again visited the same apartment and there made a purchase of heroin in two packages. One package, weighing 9.5 grams was delivered to me by Ignacia Rosario and Carolyn Baxter. The second package, weighing 9.2 grams, was delivered to me by Domingo Rosario. The contents of Both packages were analyzed and found to contain heroin hydrochloride. While present in the said apartment, I observed Ignacia Rosario make two sales to unknown persons - whom she said were heroin customers.

3. On May 22, 1973, while in the mentioned apartment, Ignacia Rosario showed me a quantity of alleged heroin which she said could be cut three times. She cut the white powder in my presence and sold same to another person. Domingo Rosario then delivered to me 15.7 grams of heroin for which I paid \$1650.00. This powder too was tested and determined to contain heroin hydrochloride. Participating in this sale were Domingo Rosario, Ignacia Rosario, Jose Rosario and "Papo." SS

4. On June 5, 1973, I returned to the same apartment spoke to Ignacia and Domingo Rosario and ordered delivery of 1/8 kilo of heroin for June 7, 1973. Domingo Rosario said that he had just purchased 2 ounces of heroin which could be cut 6 times.

5. Ignacia Rosario claims to have been arrested for possession of Dangerous Drugs and indicates that at that time she had 1/8 kilo of cocaine, a gun, and \$11,000 on the premises but that the searching officers failed to locate these articles. I have verified the fact that Ignacia Rosario was arrested in 1970 and 1971 by the New York City Police Department.


S/A DON STURN

Certificate of Service

Aug 4 . 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Sheila Rosenberg